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No.

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1999

SEAMAN BRIAN H. HENSLEY, USN, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the findings and sentence of a court-martial can stand despite the absence of a statutorily mandated step in the process?

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PETITION FOR A WRIT OF CERTIORARI

Sonar Technician (Surface) Seaman Brian H. Hensley, United States Navy, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces (App. 1a-15a) is reported at 52 M.J. 391. The opinion of the Navy-Marine Corps Court of Criminal Appeals (App. 16a-25a) is unreported.

JURISDICTION

The Court of Appeals for the Armed Forces entered its judgment on March 22, 2000. This Court's jurisdiction is invoked under 28 U.S.C. § 1259(3) (Supp. 1999).

STATUTORY PROVISION INVOLVED

Article 60(d), Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 860(d) (1998), provides in part:

> (d) Before acting under this section on any general court-martial case or any special court-martial case that includes a bad-conduct discharge, the convening authority or other person taking action under this section shall obtain and consider the written recommendation of his staff judge advocate or legal officer. The convening authority or other person taking action under this section shall refer the record of trial to his staff judge advocate or legal officer, and the staff judge advocate or legal officer shall use such record in the preparation of his recommendation.

STATEMENT OF THE CASE

On December 27, 1996, the commanding officer of the U.S.S. John Paul Jones convened a special court-martial against Petitioner. He referred charges of attempted larceny and five specifications of larceny, in violation of Articles 80 and 120, UCMJ. Pursuant to a pretrial agreement, Petitioner pled guilty to the first charge and four of the five specifications under the second charge. The judge sentenced him to a bad-conduct discharge, three-months confinement, forfeiture of $500 pay per month for three months, a fine of $600, and reduction to lowest enlisted pay-grade.

Pursuant to Article 60(d), UCMJ, the legal officer of the convening authority (the commanding officer of the U.S.S. John Paul Jones) received the record of trial for his recommendation on the legality of the proceedings and the appropriateness of the sentence. The legal officer, unsure of his legal responsibilities under Article 60(d), asked another officer, LT Kevin Stampher, to prepare the recommendation. LT Stampher was not stationed on the U.S.S. John Paul

Jones. He was a limited duty officer-law stationed at the Trial Service Office West, San Diego, California.[1]

LT Stampher prepared the recommendation. He advised the convening authority that the findings and sentence were appropriate as adjudged. He recommended approval of both. LT Stampher also prepared a supplemental recommendation because his first recommendation erroneously stated that Petitioner did not request clemency. He again recommended approval of the findings and sentence. Relying on these recommendations, the convening authority approved the findings and sentence as adjudged.

On appeal, Petitioner challenged the legality of the posttrial recommendation because LT Stampher was statutorily unqualified to prepare it. The Navy-Marine Corps Court of Criminal Appeals agreed there was error, but found it waived because Petitioner failed to object. (App. B). The Court of Appeals for the Armed Forces affirmed in a 3-2 decision. (App. A).

REASON FOR GRANTING THE PETITION

By disregarding the plain language of Article 60(d), the lower court refused to follow a congressional mandate for a critical step in the court-martial process and deprived Petitioner of a fundamental right.

Article 60(d), UCMJ, mandates that "[b]efore acting under this section on any. . . special court-martial case that includes a bad-conduct discharge, the convening authority or other person taking action under this section shall obtain and consider the written recommendation of *his* staff judge advocate or legal officer." (Emphasis added); *see also* Rules

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[1] Limited duty officers-law are commissioned officers that formerly served as enlisted legalmen. They have limited legal training, and are not licensed attorneys or staff judge advocates.

for Courts-Martial [R.C.M.] 1106, Manual for Courts-Martial, United States (1998 ed.). LT Stampher, the drafter of Petitioner's posttrial recommendation, did not meet this statutory qualification because he was not the convening authority's staff judge advocate or his legal officer.

Despite this fact, the Court of Appeals for the Armed Forces found no plain error. (App. 6a). In reaching this holding, the court stated that the Petitioner had no right to a recommendation prepared by a specific individual. *Id.* And, even if the right existed, Petitioner waived it by failing to object. (App. 6a-7a). Finally, the court concluded that Petitioner's rights were not materially prejudiced. (App. 7a). These conclusions ignore clear a congressional mandate to the contrary, and thus, the court trivialized a fundamental step in the court-martial process.

First, Petitioner does have a right to a recommendation from a specific individual. He has the right to have it prepared by a statutorily qualified officer. Article 60(d), UCMJ, requires that the convening authority's staff judge advocate or legal officer prepare the recommendation. It is the convening authority's staff judge advocate or legal officer, "as [his] senior advisor on military justice matters, [that is] best qualified to make a recommendation to the convening authority as to how he should exercise his powers." *Hearings on S. 2521 Before the Subcomm. on Manpower and Personnel of the Senate Armed Services Comm.*, 97th Cong. 87 (1982).

LT Stampher plainly did not meet this requirement. He was neither the convening authority's staff judge advocate nor his legal officer. Although the lower court attempts to circumvent the plain language of Article 60(d), UCMJ, by suggesting that R.C.M. 1106(c)(1) allows a convening authority to substitute legal officers, (App. 6a), it ignores the plain language of that rule in reaching this conclusion. R.C.M. 1106(c)(1) only applies when the convening authority "*does not have a staff judge advocate or legal officer or that person is disqualified.*" (Emphasis in original).

Here, the convening authority has a legal officer and that officer is not disqualified. *See* R.C.M. 1106(b). Moreover, the rule only grants convening authorities the power to substitute legal officers. It does not permit legal officers to delineate their statutory obligations on their own initiative, as is the case here.

Second, preparation of the posttrial recommendation by a statutorily unqualified officer materially prejudiced Petitioner's substantial rights. Unlike civilian jurisdictions, the final arbiter of court-martial proceedings is the convening authority. His or her authority to overturn the findings and all or part of the sentence is plenary. *See* Art. 60(c), UCMJ. The posttrial recommendation "plays a vital role" in the exercise of that discretion. *United States v. Wheelus*, 49 M.J. 283, 287 (1998). Failure to have a qualified officer draft the posttrial recommendation is "a fundamental flaw in the post-trial process." *United States v. Finster*, 51 M.J. 185, 188 (1999).

Although the lower court attempts to minimize this prejudice by suggesting that LT Stampher was more experienced than the convening authority's legal officer, competency does not equate to statutory qualification. Congress clearly intended that the recommendation be prepared by the convening authority's principal adviser in matters of military justice. It is this relationship between the commander, the legal officer, and the command that allows for a commander's unfettered discretion to be exercised in a just and fair manner. *See Finster*, 51 M.J. at 188.

This rings especially true after the Military Justice Act of 1983 streamlined the recommendation process and eliminated lengthy legal review of the record. Although the modern recommendation requires little in the way of technical legal training, it does require a familiarity with the convening authority, the circumstances surrounding the offense that may be outside the record, and the impact of the offenses and punishment on the command. (App. 10a). An outsider, like LT Stampher, simply lacks this familiarity, and his advice

cannot be substituted for an officer with such knowledge. The recommendation is much more than a "ministerial action. . . . Its heart and soul exist in the judgment of the drafter as to whether the adjudged sentence is appropriate and whether clemency is warranted." *Finster*, 51 M.J. at 187 (quoting *United States v. Cunningham*, 44 M.J. 758, 763 (N.M. Ct. Crim. App. 1996)).

Finally, Petitioner's failure to object does not waive the error. The Court of Appeals for the Armed Forces has stated that preparation of a recommendation by an unqualified officer is a "fundamental flaw" in a court-martial proceeding. *See Finster*, 51 M.J. at 188. This view comports with this Court's interpretation of courts-martial as courts of special and limited jurisdiction. *See Runkle v. United States*, 122 U.S. 543, 555 (1887).

In *Runkle*, the secretary of war signed an action approving the findings of Major Runkle's court-martial and that part of the sentence pertaining to a dismissal. Four years later, the president signed an action that set aside the findings and sentence. This Court addressed which action was effective, when the Articles of War mandated that only the president could dismiss a general officer. This Court began its opinion by unequivocally stating that courts-martial had limited and special jurisdiction. "To give effect to its sentences it must appear affirmatively and unequivocally that . . . the statutory regulations governing its proceeding had been complied with, and that its sentence was conformable to law." *Id.* at 556 (citing *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 80 (1857)). The Court then stated that even though the president had broad discretion to delegate his executive authority, his obligation to take action on a court-martial was non-delegable. Congress, through the Articles of War, committed upon him "the important judicial power of finally determining upon an examination of the whole proceedings of a court-martial, whether an officer holding a commission in the army of the United States shall be dismissed . . . ." *Id.* at 557. Because the secretary's action

could not satisfy the limits set forth by Congress, Major Runkle "was never legally cashiered or dismissed from the army . . . ." *Id.* at 560.

Like *Runkle*, the statutory provisions governing the execution of Petitioner's punitive discharge, as set forth in Article 60, UCMJ, have not been complied with. The author of the posttrial recommendation was statutorily unqualified to give such advice. His recommendation was fundamentally flawed. And, if the recommendation was flawed, then the action that relied on it was flawed. As such, the findings and sentence of Petitioner's court-martial have not been approved as required by statute, and thus, cannot be given effect.

CONCLUSION

A court-martial is a court of special and limited jurisdiction. To give effect to its findings and sentences, its statutory rules must be strictly adhered to. Here, the Court of Appeals for the Armed Forces ignored the clear language of Article 60(d) by allowing an unauthorized officer prepare the recommendation in Petitioner's case. As Judge Sullivan stated in his dissent in this case, "[a] majority of this Court is now effectively attempting to rewrite Article 60(d) by allowing *any* nonlawyer 'legal officer' to prepare the recommendation." (App. 8a). Because this holding impermissibly expands a court-martial's statutory limits, Petitioner respectfully requests this Court grant writ of certiorari to correct this fundamental flaw in his court-martial proceeding.

Respectfully submitted,

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June 2000

APPENDIX A

U.S. COURT OF APPEALS FOR THE ARMED FORCES

No. 99-0111

Crim. App. No. 98 0225

United States, *Appellee*

v.

Brian H. HENSLEY, Sonar Technician (Surface) Seaman
U.S. Navy, *Appellant*

Argued November 10, 1999
Decided March 22, 2000

For Appellee: *Lieutenant Danette L. Walker*, JAGC, USNR (argued); *Colonel Kevin M. Sandkuhler*, USMC, and *Commander Eugene E. Irvin*, JAGC, USN (on brief); *Major Troy D. Taylor*, USMC.

For Appellant: *Lieutenant M. Eric Eversole*, JAGC, USNR (argued); *Lieutenant Commander R. C. Klant*, JAGC, USN (on brief).

Judge GIERKE delivered the opinion of the Court:

A military judge sitting as a special court-martial convicted appellant, pursuant to his pleas, of attempted larceny and larceny, in violation of Articles 80 and 121, Uniform Code of Military Justice, 10 USC §§ 880 and 921, respectively. The adjudged and approved sentence provides for a bad-conduct discharge, confinement and forfeitures

for 3 months, and reduction to the lowest enlisted grade. The Court of Criminal Appeals affirmed.

Our Court granted review of the following issue:

> WHETHER THE LOWER COURT ERRED IN FINDING THAT IT WAS NOT PLAIN ERROR FOR THE POST-TRIAL RECOMMENDATION IN APPELLANT'S CASE TO BE PREPARED BY A "COMMAND SERVICES OFFICER" WHO WAS NEITHER THE CONVENING AUTHORITY'S STAFF JUDGE ADVOCATE NOR HIS LEGAL OFFICER.

For the reasons set out below, we affirm.

Factual Background

Appellant's court-martial was convened by the commanding officer of the USS JOHN PAUL JONES. The ship's legal officer asked Lieutenant (LT) Kevin Stampher, Command Services Department Head at the Trial Service Office West, based in San Diego, California, to prepare the post-trial recommendation. LT Stampher is a qualified legal officer.

LT Stampher prepared a post-trial recommendation and submitted it to the convening authority. He signed his own name and identified the document as coming from "Command Services Officer, Trial Service Office West." The defense was served with the post-trial recommendation and did not object to having it prepared by LT Stampher instead of the ship's legal officer. Defense counsel did, however, point out to LT Stampher that he had neglected to mention appellant's petition for clemency. LT Stampher then submitted an addendum to his recommendation and served a copy on the defense counsel, again identifying

himself and his organization in the same manner as in the post-trial recommendation. Again, defense counsel did not challenge LT Stampher's authority.

The record is silent on the involvement of the convening authority in obtaining the assistance of LT Stampher. It does not reflect whether the ship's legal officer was directed to request that LT Stampher prepare the post-trial recommendation, or whether the request was with the knowledge or approval of the convening authority. During oral argument, however, appellate government counsel conceded that LT Stampher was not formally designated by competent authority to act as legal officer in this case. Because LT Stampher identified himself and his organization, it is evident that the convening authority knew the source of the post-trial recommendation and chose to rely on it.

Discussion

Appellant now asserts that LT Stampher was statutorily unqualified to prepare and submit the post-trial recommendation, because he was not the convening authority's legal officer. The Government does not directly contest the holding of the court below that it was error for LT Stampher to prepare and submit the post-trial recommendations. The Government argues that any error falls short of plain error and, thus, was waived by appellant's failure to object to the authorship of the post-trial recommendation.

Article 60(d), UCMJ, 10 USC § 860(d), requires that the convening authority "obtain and consider the written recommendation of *his* staff judge advocate or legal officer." (Emphasis added.) RCM 1106(c)(1), Manual for

Courts-Martial, United States (1995 ed.),* provides in pertinent part as follows:

> If the convening authority does not have a staff judge advocate or legal officer, or if the person serving in that capacity is disqualified under subsection (b) of this rule or otherwise, the convening authority shall:
>
> (A) Request the assignment of another staff judge advocate or legal officer to prepare a recommendation under this rule; or
>
> (B) Forward the record for action to any officer exercising general court-martial jurisdiction as provided in RCM 1107(a).

Neither Article 60 nor RCM 1106 requires that the convening authority's request for designation of another staff judge advocate or legal officer be in writing or personally communicated by the convening authority.

The granted issue is a question of first impression for this Court. However, the Army and Navy courts have addressed the issue, with opposite results. In *United States v. Sparks*, 20 MJ 985 (NMCMR 1985), the court-martial was convened by the commanding officer, USS MCKEE, who had a legal officer assigned to his ship. For reasons not disclosed in the record, the post-trial recommendation was prepared by the staff judge advocate (SJA) for the Commander Submarine Squadron Three (COMSUBRONTHREE). The Navy-Marine Corps Court of Military Review applied the presumption of regularity and denied a motion from appellate defense counsel to produce the document requesting the SJA of COMSUBRONTHREE to prepare the post-trial

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* The 1998 version of this rule is unchanged.

recommendation. Having presumed that the convening authority had properly requested the SJA of COMSUBRONTHREE to act in place of his legal officer, the Navy court also tested for prejudice and found none.

In *United States v. Gavitt*, 37 MJ 761 (ACMR 1993), the SJA, Berlin Brigade, was disqualified because he had engaged in an *ex parte* communication with several members of the court-martial. He informally arranged to have the SJA, 3d Infantry Division, prepare the post-trial recommendation. There was no evidence that the convening authority sanctioned this arrangement. The Army court declined to apply the presumption of regularity and did not test for prejudice. It ordered a new post-trial recommendation and action.

In *United States v. Hall*, 39 MJ 593 (ACMR 1994), the Army court again found error when the wrong SJA prepared the post-trial recommendation. The SJA, Fort Riley, Kansas, prepared the post-trial recommendation and served it on the defense. The defense alleged that the Fort Riley SJA was disqualified because a subordinate of the SJA had initiated the charges. The Fort Riley SJA requested the SJA, Fort Leavenworth, Kansas, to prepare the post-trial recommendation. Like *Gavitt*, the case was informally transferred by agreement between the two SJAs involved, without involving the convening authorities. Unlike *Gavitt*, however, the court in *Hall* found that the error was "consciously and deliberately waived." *Id.* at 595. The court found waiver based on comments from the trial defense counsel after being served with the Fort Leavenworth SJA's recommendation, where defense counsel commented that the disqualification of the Fort Riley SJA was resolved by having another SJA prepare the recommendation.

Because the Government has conceded error in the case before us, we need not decide whether the presumption of regularity invoked by the Navy court in *Sparks* should be applied. We turn instead to the question whether the conceded error amounts to plain error. *See United States v. Powell*, 49 MJ 460, 463-65 (1998). The error was obvious, because LT Stampher clearly identified himself as someone other than the ship's legal officer. The key question is whether the error materially prejudiced a substantial right.

Article 60(d) gives an accused the right to a recommendation prepared by a qualified officer. *Cf. United States v. Finster*, 51 MJ 185 (1999). Article 60(d) does not, however, give an accused a right to a recommendation from a specific individual. RCM 1106(c)(1) gives a convening authority the option to request the assignment of another SJA or legal officer for a specific case, or to forward the record to another convening authority. RCM 1106(c)(1) does not require the consent of the accused.

Once competent authority designates a substitute SJA or legal officer, that officer becomes the convening authority's SJA or legal officer within the meaning of Article 60(d). Thus, a post-trial recommendation from someone other than the ship's legal officer does not materially prejudice a substantial right, because an accused does not have a right to a recommendation from that officer. Accordingly, we conclude that the irregular designation of LT Stampher as legal officer for appellant's case did not materially prejudice a substantial right. We hold, therefore, that the error conceded by the Government does not rise to the level of plain error.

We note also that this case involves more than a passive waiver. Defense counsel not only did not object to LT

Stampher submitting the post-trial recommendation, he affirmatively interacted with him, calling appellant's clemency petition to his attention. LT Stampher responded by submitting an addendum to the convening authority and serving a copy on defense counsel. Defense counsel again did not avail himself of the opportunity to challenge LT Stampher's authority to submit the addendum. Thus, this case presents a situation more akin to the affirmative waiver found by the Army court in *Hall*.

Finally, even assuming *arguendo* that there was plain error, we are satisfied that appellant was not prejudiced as to result. Because LT Stampher was qualified as a legal officer, we are not faced with the same error as in *Finster*. There is nothing in the record suggesting, and appellant does not assert, that there was any forum shopping or other manipulation of the process authorized by RCM 1106(c) to influence the content of the recommendation. The post-trial recommendation and addendum, considered together, are legally correct. The recommendation was prepared by an officer of greater experience than the ship's legal officer. Appellant's requests for deferment and clemency were properly presented to the convening authority. As appellant has made no "colorable showing" that he would have received a more favorable recommendation from the ship's legal officer, there was no potential for prejudice for the Government to rebut. *See United States v. Wheelus*, 49 MJ 283 (1998). Accordingly, we conclude that appellant is not entitled to relief.

Decision

The decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

SULLIVAN, Judge, with whom EFFRON, Judge, joins (dissenting):

Article 60(d), UCMJ, 10 USC § 860(d), states that "the convening authority or other person taking action under this section shall obtain and consider the written recommendation of *his* staff judge advocate or legal officer." (Emphasis added.) A majority of this Court is now effectively attempting to rewrite Article 60(d) by allowing *any* nonlawyer "legal officer" to prepare the recommendation. RCM 1106(c), Manual for Courts-Martial, United States (1995 ed.), applies to situations in which a convening authority has no staff judge advocate or legal officer, or where such person is disqualified from advising the convening authority due to his or her previous involvement in the case. It is not a blanket authorization to the convening authority to allow *any* "legal officer" to prepare the recommendation.

Article 60(d) is violated in this case because the recommendation was not prepared by the convening authority's legal officer, but was prepared by some other nonlawyer legal officer. The government concedes this error. Accordingly, *United States v. Finster*, 51 MJ 185, 188 (1999), mandates that this case should be reversed and remanded for a new staff judge advocate recommendation that is in compliance with Article 60(d).

The majority has given no reason why this Court should not be bound by *Finster* in this case. Both cases are remarkably similar. In both *Finster* and this case, there was a post-trial recommendation made by a *nonlawyer designated as a legal officer*. In fact, in *Finster*, the designated "legal officer" (it should be noted that he was an enlisted noncommissioned officer) was an honors graduate of the Naval Justice School's Legal Officer Course. *United*

States v. Finster, *supra*, appellant's final brief at 2. Furthermore, in *Finster*, just as in this case, there was no objection to the post-trial recommendation. Comparing both *Finster* and the case at bar, the core issue which emerges is: Was appellant prejudiced by the post-trial recommendation prepared by a person unqualified under Article 60(d)?

In *Finster*, this Court answered that question by holding that the nonlawyer who was functioning as a legal officer was unqualified under the UCMJ and that his preparation of the post-trial recommendation was a "fundamental flaw." 51 MJ at 186-88. In the case at bar, the question (on the prejudice of an unqualified person preparing the recommendation) should similarly be answered in the affirmative. The nonlawyer "legal officer" here was unqualified because he was not *the legal officer of the convening authority*. *See also Cooke v. Orser*, 12 MJ 335, 344 (CMA 1982) (Congress intended special relationship between commander and his staff judge advocate). In both *Finster* and in this case, a nonlawyer, unqualified under the plain wording of the UCMJ, gave the post-trial recommendation. In *Finster*, this Court gave relief. The same result should be followed here. Accordingly, I dissent.

EFFRON, Judge (dissenting):

I agree with Judge Sullivan's dissent and offer the following additional views.

As indicated in the majority opinion, both parties agree that it was error to have appellant's post-trial recommendation prepared by a "command services officer" who was neither the convening authority's staff judge advocate (SJA) nor his legal officer. In this case, as in

United States v. Finster, 51 MJ 185 (1999), the erroneous use of a statutorily unqualified person to prepare the post-trial recommendation requires a remand to the convening authority for a new recommendation and action.

Article 60(d), UCMJ, 10 USC § 860(d), requires the convening authority to "obtain and consider the written recommendation of *his* staff judge advocate or legal officer." (Emphasis added). The express language of the statute indicates that Congress contemplated that there would be a command-staff relationship between the convening authority and "his" legal advisor. As discussed in *Finster*, although the Military Justice Act of 1983 streamlined the post-trial process, *see* 51 MJ at 186, Congress emphasized the continuing importance of the post-trial recommendation prepared by the convening authority's SJA or legal officer. Although the 1983 Act eliminated the requirement for a lengthy legal review of the record, Congress continued to expect the post-trial recommendation to reflect the legal advisor's discretion, judgment, and knowledge.

During hearings before a subcommittee of the Senate Armed Services Committee, the General Counsel of the Department of Defense highlighted the fact that the SJA or legal officer, as the convening authority's senior advisor on military justice matters, would be the person best qualified to make a recommendation to the convening authority as to how he should exercise his powers. *See id.* at 187, quoting *Hearings on S. 2521 Before the Subcomm. on Manpower and Personnel of the Senate Armed Services Comm.*, 97th Cong., 2d Sess. 87 (1982) (response by Mr. Taft to question from Senator Exon). In its report on the legislation, the Senate Armed Services Committee emphasized the importance of the relationship between the

convening authority and his legal advisor by stating that the post-trial recommendation would still be provided "by the convening authority's principal advisor on military justice matters." *Id.*, quoting S.Rep. No. 53, 98th Cong., 1st Sess. 20 (1983).

The relationship between the convening authority and his or her legal advisor has been an important feature of the UCMJ since its enactment in 1951. Article 6(a), UCMJ, 10 USC § 806(a), places the assignments of all judge advocates and legal officers under the control of the Judge Advocate General of the armed force of which they are members. In 1951, then-Major Kenneth J. Hodson, an authoritative commentator on the UCMJ and the Manual for Courts-Martial, United States, 1951, noted that Article 6(a) contemplated that the Judge Advocate General would assign judge advocates and legal officers that possess the basic qualifications and characteristics necessary to form a confidential and advisory relationship with the convening authority. *See* Legal and Legislative Basis, Manual, *supra* at 137-40 ("The Staff Judge Advocate and Legal Officer"). According to Hodson, the relationship with the SJA or legal officer as trusted advisor would facilitate decisions being made by the convening authority on matters of military justice. *Id.*

Other provisions of the UCMJ underscore the significance of the relationship between the convening authority and his SJA or legal officer. Article 6(b) requires the convening authority to communicate directly with his or her SJA or legal officer in matters relating to military justice. According to Major Hodson, "[a]rticle 6(b) not only authorizes direct communication within military justice channels but also enhances the position of judge advocates and legal officers by requiring direct communication on

military justice matters between such officers and their commanding officers." *Id.* at 138. Art. 6(b) also authorizes the SJA or legal officer to communicate with the SJA or legal officer of superior or subordinate commands. In sum, Articles 6 and 60 confer a special status on the legal advisor, both in terms of his or her relationship with the convening authority and within the chain of command.

As the majority points out, there are certain circumstances in which a substitute SJA or legal officer from another command may be assigned to prepare the post-trial recommendation, but such action is permissible only in cases where the convening authority actually requests such assistance under particular circumstances. RCM 1106(c)(1), Manual for Courts-Martial, United States (1998 ed.). Once the convening authority designates a substitute SJA or legal officer, that officer becomes the convening authority's SJA or legal officer within the meaning of Article 60(d). These provisions do not permit a command legal officer to arrange informally for another officer outside the chain of command to prepare the post-trial recommendation.

In the present case, the post-trial recommendation was prepared by LT Stampher, an officer on limited duty temporarily assigned to the Trial Service Office West as a "Command Service Officer". The Government conceded during oral argument that LT Stampher was not formally designated by competent authority to act as the legal officer in this case. The Government acknowledged that the convening authority's legal officer asked LT Stampher to prepare the post-trial recommendation because the legal officer did not know how to properly prepare the document. Rather than asking for assistance or for the convening authority to refer the case to a qualified legal officer, the

legal officer took it upon himself to ask LT Stampher to prepare the document for the convening authority.

The Government contends that "[h]ad the command's legal officer known how to prepare the recommendation it would have been identical in every respect except its authorship." Answer to Final Brief at 7. Therein lies the fundamental problem with this case. The post-trial recommendation is not simply a fill-in-the-blank form that anyone can complete by inserting personnel data. It is statutorily designated as a "recommendation." As such, it must reflect an exercise in discretion, judgment, and reason by the person designated to serve as the convening authority's advisor on military justice matters. The Government's assumption that recommendations written by two different people—exercising their own discretion, judgment, and reason—would necessarily produce identical recommendations demonstrates a fundamental misunderstanding as to the very purpose of a post-trial recommendation. As the Court of Criminal Appeals said in *United States v. Cunningham*, "The recommendation is much more than a ministerial action or mechanical recitation of facts concerning the trial. Its heart and soul exist in the judgment of the drafter. . . ." 44 MJ 758, 763 (N.M.Ct.Crim.App. 1996).

The Government suggests that appellant benefited from the fact that the designated legal officer did not prepare the recommendation because he "was unsure how one should be drafted." Answer to Final Brief at 7. In other words, appellant should feel grateful that the recommendation was prepared by an unqualified nonlawyer rather than an incompetent nonlawyer. Considering the fact that only the seagoing services are permitted to use nonlawyers to prepare post-trial recommendations, *see* Arts. 1(12) and

60(d), there is no excuse for permitting a servicemember's case to be reviewed by a nonlawyer who is either unqualified or incompetent.

As this Court indicated in *United States v. Curry*, Congress afforded the flexibility of using nonlawyers to the naval services because many "special courts-martial are convened by commanders of vessels and deployed units to which a staff judge advocate is not assigned; and for them it may be difficult and time-consuming to arrange for the record of trial to be examined by a lawyer." 28 MJ 419, 422 (CMA 1989). This exception, however, did not contemplate that the seagoing services would fail to properly train its nonlawyer legal officers to perform these critical functions, or that they would permit these officers to designate unqualified persons to do so.

As we held in *Finster*, and as the Navy-Marine Corps Court correctly noted in *Cunningham*, the use of a statutorily unqualified person to prepare the post-trial recommendation

> strikes at the core of the integrity and reputation of military justice in the naval service. . . .[E]very appellant in the naval service should be able to expect that as a matter of fairness, his or her case will be reviewed by and have a post-trial recommendation from a statutorily qualified officer.

51 MJ at 188, quoting *Cunningham*, *supra* at 764. Appellant is entitled to the same expectation in this case. *See Finster*, *supra* at 189 ("appellate court[s]. . . do not have to accept incomplete or sloppy work. I would never require a showing of 'prejudice' before sending a case back to a convening authority to fix administrative errors in the record.") (Cox, C.J., concurring).

In accordance with the Code and applicable case law, I would reverse the decision of the United States Navy-Marine Corps Court of Criminal Appeals and order a new convening authority's action and recommendation by his own legal officer.

APPENDIX B

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, DC

BEFORE

K.T. SEFTON R.B. LEO D.A. ANDERSON

UNITED STATES

v.

Brian H. HENSLEY, 538-02-0563
Sonar Technician (Surface) Seaman (E-3)
U.S. Naval Reserve

NMCM 98 00225 Decided 31 August 1998

Sentence adjudged 7 March 1997. Military Judge: R.A. Smith. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, USS JOHN PAUL JONES (DDG 53).

LCDR ROBERT C. KLANT, JAGC, USN, Appellate Defense Counsel
LT RUSSELL J.E. VERBY, JAGC, USNR, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

ANDERSON, Judge:

A military judge sitting as a special court-martial found the appellant guilty, consistent with his conditional pleas, of one specification of attempted larceny and four specifications of larceny in violation of Articles 80 and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 880 and 921 (1994) [hereinafter UCMJ]. The appellant was sentenced to confinement for three months, a forfeiture of $500 pay per month for 3 months, a fine of $600, a reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged. We have examined the record of trial, the appellant's assignments of error,[1] and the Government's response. We conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Art. 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a) and 866(c).

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[1] I. THE POST-TRIAL RECOMMENDATION IN APPELLANT'S CASE -- PREPARED BY A "COMMAND SERVICES OFFICER" WHO IS NOT A JUDGE ADVOCATE AND WHO WAS ASSIGNED TO ANOTHER, UNRELATED COMMAND -- FAILS TO SATISFY THE REQUIREMENTS OF ARTICLE 60(d), UNIFORM CODE OF MILITARY JUSTICE, AND RULE FOR COURT-MARTIAL 1106 THAT SUCH A RECOMMENDATION BE PREPARED BY THE CONVENING AUTHORITY'S DESIGNATED "STAFF JUDGE ADVOCATE" OR "LEGAL OFFICER."

II. THE MILITARY JUDGE ERRED IN DENYING APPELLANT'S MOTIONS TO SUPPRESS HIS STATEMENTS AND CERTAIN SEIZED EVIDENCE.

III. APPELLANT'S RECORD OF TRIAL IS SUBSTANTIALLY INCOMPLETE DUE TO THE MILITARY JUDGE'S ERROR IN FAILING TO ENTER HIS ESSENTIAL FINDINGS ON THE RECORD.

The appellant first contends that the post-trial recommendation in this case fails to satisfy the requirements of Article 60(d), UCMJ, 10 U.S.C. § 860(d) and RULE FOR COURTS-MARTIAL 1106, MANUAL FOR COURTS-MARTIAL, UNITED STATES (1995 ed.) [hereinafter R.C.M.] because it was prepared by a command services officer instead of the convening authority's staff judge advocate or legal officer. The command services officer at issue was a Navy Lieutenant serving as a Limited Duty Officer (Law) assigned to the Trial Service Office West as the Command Services Department Head. Affidavit of LT K.D. Stampher, USN of 23 July 1998. He was also a graduate of the Naval Justice School's Lawyer Course. *Id.* He was not the convening authority's staff judge advocate or legal officer. Once the post-trial recommendation was completed, it was served on the appellant. The appellant did not comment on any matter in the recommendation, but submitted a petition for clemency.

We agree with the appellant that it was error for someone other than the staff judge advocate or legal officer to prepare the post-trial review. *United States v. Kema*, 10 C.M.A. 272, 27 C.M.R. 346 (1959); *United States v. Reed*, 19 M.J. 764 (A.C.M.R. 1984). The appellant's failure to comment, however, waives this error in the absence of plain error. R.C.M. 1106(f); *United States v. Aquino*, ___ M.J. ___, No. 98-00392, (N.M.Ct.Crim.App. 31 Aug. 1998).

The Supreme Court articulated a three-part test for plain error in *United States v. Olano*, 507 U.S. 725, 732-34 (1993): (1) whether there was an error; (2) whether the error was plain; and (3) whether the plain error affected the appellant's "substantial rights." In this case, there was error and the error was plain, but it did not affect the

appellant's "substantial rights." The post-trial review was prepared by a commissioned officer, with specific legal training, who was serving in a legal billet. In addition, the recommendation that was prepared met the purpose and all the requirements of R.C.M. 1106(d). The recommendation was served upon the trial defense counsel for comment, the proof of service was attached to the record, and the trial defense counsel submitted a petition for clemency. In his action on the record, the convening authority specifically indicated that he considered the post-trial recommendation and the clemency petition. The appellate defense counsel did not articulate any specific prejudice. Accordingly, we find no material prejudice to any of the appellant's substantial rights. Art. 59(a), UCMJ, 10 U.S.C. § 859(a).

Next, the appellant contends that the military judge erred in denying his motions to suppress his confession and certain seized evidence. As a corollary to this assignment of error, the appellant further contends that his record of trial is substantially incomplete due to the military judge's error in failing to enter essential findings on the record.

First, we consider the judge's failure to enter essential findings. When factual issues are involved in determining a motion made prior to pleas, the military judge is required to state the essential findings on the record. R.C.M. 905(d); *United States v. Postle*, 20 M.J. 632, 636 (N.M.C.M.R. 1985). In this case, after denying the appellant's suppression motions prior to accepting pleas, the military judge failed to enter essential findings. This was error, and the usual remedies are to order a rehearing or return the record of trial to the military judge for entry of the essential findings. *United States v. Doucet*, 43 M.J. 656, 659 (N.M.Ct.Crim.App. 1995). Under the authority of Article 66(c), UCMJ, 10 U.S.C. § 866(c), however, we have the

option of resolving this matter through our own fact-finding power, and we choose to exercise that option in this case. *Doucet*, 43 M.J. at 659.

The following are our essential findings with respect to the suppression motions:

1. In early October, 1996, Petty Officer N. reported to authorities aboard the USS JOHN PAUL JONES that his wallet was missing, including $300 in cash and some ATM cards, to include his shipboard ATM card, number 386. The ship's disbursing office put a hold on his shipboard ATM account for card number 386 and issued him a new card.

2. On the morning of 16 October 1996, Petty Officer N.'s missing ATM card number 386 was found on the mess decks. In addition, three ATM slips were found on top of the ATM machine that matched the number on the missing card.

3. The leading disbursing clerk reviewed the data report from the ATM for 15 October 1996 in order to display the details of the transactions with card number 386. The data report showed the following: A withdrawal attempt (transaction number 183) was made using card number 386 at 21:24:15 on 15 October 1996. A balance inquiry (transaction number 184) was made using card number 386 at 21:24:41 on 15 October 1996. Both transactions resulted in the message, "Account not on file." The next transaction (transaction number 185) was a balance inquiry made by the appellant at 21:26:49 on 15 October 1996. The next transaction (transaction number 186) was a withdrawal attempt using card number 386 at 21:27:31 on 15 October 1996. It again resulted in the message, "Account not on file." The

substance of this information was provided to the ship's chief master-at-arms.

4. Because only about forty seconds elapsed between the appellant's transaction and the next unauthorized transaction, the chief master-at-arms and his assistant decided to interview the appellant as a potential witness. They thought the appellant might be able to identify who was in the area when he used the machine. They did not suspect him of an offense at the time.

5. The appellant consented to be interviewed. Although he had burned himself on the arm in the galley just prior to being questioned, he declined immediate medical treatment. The chief master-at-arms and his assistant questioned the appellant in private in a small office aboard ship. At the time the interview started, the appellant was not suspected of committing any crime and he was not under apprehension.[2]

6. Initially, appellant was informed by his interviewers that he was being questioned because there was a possibility that he could have been a witness to the unauthorized use of an ATM card that occurred at about the same time he used his card the night before. Appellant denied seeing anyone. Once he made this denial, his interviewers believed he might be a suspect. At this point, prior to the appellant making any incriminating statements, the interviewers explained to

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[2] We note in this regard that the Discussion to R.C.M. 302(a)(1) defining apprehension provides that "[a]n apprehension is different from detention of a person for investigative purposes, although each involves the exercise of government control over the freedom of movement of a person. An apprehension must be based on probable cause . . . ."

him his Article 31(b), UCMJ, 10 U.S.C. § 831(b), rights from a printed "Military Suspect's Acknowledgement and Waiver of Rights" form and had him initial each right. The form indicated that he was suspected of "having knowledge or witnessing a possible fraudulent act to wit: unauthorized use of shipboard ATM card." The appellant waived his rights, and the interview continued.

7. Under further questioning, the appellant continued to deny that he had seen anything. Finally, one of the interviewers asked the appellant directly if he had taken the wallet. The appellant then admitted that he had. He wrote out and initialled the following statement on the rights waiver form: "I STG Hensley have taken the wallett [sic] and tried to use shipboard atm and withdrew 600 dollars out of checking account of owner atm card. I am sorry I did anything and wish to tell everything I did with wallett [sic]."

8. After this confession, the interviewers asked the appellant for his consent to search his berthing space, to include his rack and locker. He was told that if he did not consent, they could possibly obtain a search authorization from the commanding officer. He agreed to the search and signed a "Permissive Authorization For Search and Seizure" form. This form indicated that the interviewers were conducting an investigation into the offenses of "knowledge or witnessing a possible fraudulent act to wit: unauthorized use of a shipboard ATM card." Under the totality of the circumstances and by clear and convincing evidence, his consent to search was voluntary.

9. The interviewers and the appellant then proceeded to berthing, and the appellant opened his locker and

removed all the items that did not belong to him, to include: Petty Officer N.'s wallet and ID card, Petty Officer N.'s civilian and military ATM cards, and $900 in cash.

10. After the search of his locker, the aforementioned items were delivered to the executive officer for safekeeping, and the appellant proceeded to the medical department, where his burn was dressed and bandaged.

With this factual basis, we can address appellant's concerns about the military judge's decision to deny his suppression motions. Our review of these issues is a *de novo* review. *United States v. Curry*, 48 M.J. 115, 116 (1998); *United States v. Davis*, 36 M.J. 337, 340 (C.M.A. 1993), *aff'd*, 512 U.S. 452 (1994).

We find that at the initiation of appellant's interview with the chief master-at-arms and his assistant, he was neither under apprehension nor a suspect. *See California v. Beheler*, 463 U.S. 1121 (1983) (a suspect was not "in custody" for purposes of *Miranda* when he voluntarily agreed to accompany the police to the police station, was told he was not under arrest, and was released after a 30 minute interview); *United States v. Davis*, 36 M.J. at 340-41 (individual not a suspect where investigation had not sufficiently narrowed to make him one); *United States v. Morris*, 13 M.J. 297 (C.M.A. 1982)(test to determine if a person is a suspect is whether, considering all facts and circumstances at the time of the interview, the Government interrogator believed or reasonably should have believed that the one interrogated committed an offense). Rather, he was interviewed as a possible witness to a crime. Because he was not in custody, not a suspect, and not initially asked any questions designed to invoke an incriminating response, no rights warnings were required. Art. 31, UCMJ, 10

U.S.C. § 831; *Miranda v. Arizona*, 384 U.S. 436 (1966); *United States v. Tempia*, 16 C.M.A. 629, 37 C.M.R. 249 (1967).

Once the appellant became a suspect, the interviewers provided him with the required rights warnings. *United States v. Schake*, 30 M.J. 314, 317 (C.M.A. 1990). The appellant even admitted under oath that after he informed the interviewers that he had not seen anyone at the ATM, they stopped questioning him and read him his rights. Record at 116-17. Although the interviewers did not specifically mention the offense of larceny in the written rights advisement, they clearly oriented the appellant to the nature of the accusation at issue. *United States v. Quintana*, 5 M.J. 484 (C.M.A. 1978); *United States v. Rice*, 11 C.M.A. 524, 29 C.M.R. 340 (1960)(purpose of informing suspect of nature of accusation is to orient him to the incident in which he is allegedly involved; it is not necessary to spell out details with technical nicety); *United States v. Davis*, 8 C.M.A. 196, 24 C.M.R. 6 (1957)(advice as to charge need not be spelled out with particularity of legally sufficient specification; it is enough if, from what is said and done, accused knows general nature of charge). The appellant's confession occurred only after he had waived his rights and consented to continue with the interview.

After the appellant confessed, we are satisfied that he consented to the search of his locker freely and voluntarily. The fact that he was presented with the option of either an immediate consent search or one that might possibly be conducted pursuant to a commanding officer's authorization, if it could be obtained, did not vitiate his voluntary consent. *United States v. McClain*, 31 M.J. 130, 133 (C.M.A. 1990); *United States v. Salvador*, 740 F.2d

752, 757 (9th Cir. 1984). His options were correctly explained to him, he was in no way threatened, and he was not subjected to oppressive conditions. Even assuming the consent search was invalid, application of the doctrine of "inevitable discovery" would leave us with the same evidence. *Nix v. Williams*, 467 U.S. 431 (1984).

Having reviewed the military judge's decision on the suppression motions *de novo*, we find that the military judge did not err.

Although not assigned as an error, the convening authority's action purports to order the bad-conduct discharge executed. Clearly, the convening authority does not have this power until appellate review is complete, and hence such action is a nullity. *United States v. Pilkington*, 48 M.J. 523, 526 (N.M.Ct.Crim.App. 1998).

Finally, we note that the special court-martial order incorrectly states the amount of the larceny in Specification 4 of Charge I ($61 vice $60) and the finding with respect to Specification 5 of Charge I (NG vice withdrawn w/o prejudice). Although we see no danger of prejudice, the appellant is entitled to a court-martial order that correctly summarizes the charges and specifications and the findings. We will provide appropriate remedial action in our decretal paragraph.

Accordingly, we affirm the findings and the sentence, as approved on review below. We direct that an appropriate convening authority issue a corrected promulgating order.